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No. 82-1256

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

DENNIS LYNCH, Individually And As Mayor Of The City of Pawtucket, RICHARD A. MUMFORD, Individually And As Finance Director For The City Of Pawtucket, And GUY DUFAULT, Individually And As Director Of Department Of Parks And Recreation Of The City of Pawtucket, And The CITY OF PAWTUCKET,

Petitioners,

v.

DANIEL DONNELLY, GEORGE KRIEBEL, ROBERT GOODWIN, GREG FRAZIER And AMERICAN CIVIL LIBERTIES UNION, RHODE ISLAND AFFILIATE,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the First Circuit

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BRIEF OF *AMICUS CURIAE* THE WASHINGTON LEGAL FOUNDATION IN SUPPORT OF REVERSAL

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QUESTION PRESENTED

Does Municipal Sponsorship of a Traditional and Dominantly Secular Christmas Display Which Includes a Creche Violate the Establishment Clause?

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BRIEF OF *AMICUS CURIAE* THE WASHINGTON LEGAL FOUNDATION

INTERESTS OF *AMICUS CURIAE*

The Washington Legal Foundation (WLF or Foundation) is a non-profit corporation organized and existing under the laws of the District of Columbia for the pur-

pose of engaging in litigation and the administrative process in matters affecting the broad public interest. WLF, which has offices in Washington, D.C. and Dallas, Texas, has more than 200,000 members, contributors and supporters throughout the United States, including the State of Rhode Island, whose interests the Foundation represents.

WLF participates in and devotes a substantial portion of its resources to cases involving the constitutional rights of citizens to be free from excessive government regulation and unnecessary interference with traditional liberties. The Foundation believes, and this Court has recognized, that Americans are by nature a religious people. Accordingly, WLF seeks to advance the interests of its members, the citizens of Rhode Island, and the public at large by urging this Court to reverse the court below. The First Circuit presently holds that a municipality violates the establishment clause whenever it supports the inclusion of a creche in a Christmas display. This novel decision ignores first amendment jurisprudential principles as articulated by this Court and seeks to deny the religious heritage of the Christmas holiday.

The Foundation has appeared before this Court as *amicus curiae* on numerous past occasions. *See e.g.*, *Zant v. Stephens*, 51 U.S.L.W. 4891 (June 22, 1983); *United States v. Ptasynski*, 51 U.S.L.W. 4674 (June 6, 1983); *Eddings v. Oklahoma*, 455 U.S. 104 (1982); *General Building Contractors Assoc., Inc. v. Commonwealth of Pennsylvania*, 102 S.Ct. 3368 (1982); and *United Steel Workers v. Weber*, 443 U.S. 193 (1979). More specifically, WLF is presently representing several Congressmen-intervenors in opposition to a legal challenge by atheist Madalyn Murray O'Hair to remove congressional chaplains from the Congress. *Murray v. Buchanan*, No. 81-1301 (D.C. Cir. filed Sept. 22, 1982).

The Washington Legal Foundation can bring to this case a perspective not presently represented by the parties in interest which will assist this Court in obtaining full consideration of the public interest issues involved. The present parties are primarily concerned with the immediate end results of this lawsuit, namely the constitutionality of incorporating the creche in question within the municipality's annual Christmas display. For this reason, the long-term effects and deeper philosophical issues surrounding this controversy may be obscure. WLF will address these issues in the court of demonstrating why the city's right to include the creche furthers the general public interest.

Both parties have consented to the filing of this *amicus curiae* brief.

STATEMENT OF THE CASE

In the interest of judicial economy, *amicus* adopts the statement of the case provided in Petitioner's brief.

SUMMARY OF ARGUMENT

The First Circuit Court of Appeals was incorrect in applying a strict scrutiny analysis to determine whether the inclusion of a creche in the City of Pawtucket's traditional Christmas display is constitutional under the establishment clause of the first amendment. Under an appropriate application of the three-part *Lemon* test it is clear that the City's articulated purpose for including the creche was secular in nature, the inclusion neither had the effect of advancing nor inhibiting religion and the City's action resulted in no excessive entanglement with religion.

To affirm the First Circuit's ruling would be to sanction hostility to the religious heritage of our nation and disaffirm the principle of benevolent neutrality mandated by the establishment clause decisions of this Court. For all these reasons, the lower court should be reversed.

ARGUMENT

I. THE FIRST CIRCUIT COURT OF APPEALS WAS INCORRECT IN APPLYING A STRICT SCRUTINY ANALYSIS TO DETERMINE WHETHER THE INCLUSION OF A CRECHE IN THE CITY OF PAWTUCKET'S CHRISTMAS DISPLAY IS CONSTITUTIONAL UNDER THE ESTABLISHMENT CLAUSE OF THE FIRST AMENDMENT

The first amendment to the United States Constitution states in relevant part that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . ." By incorporation through the due process clause of the fourteenth amendment, the first amendment's prohibition against official support of, and affiliation with, religious philosophies and institutions applies equally to the actions of state and local governments. *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940); *Everson v. Board of Education*, 330 U.S. 1, 8 (1947).

Amicus acknowledges at the outset the difficult task confronting any court called upon to reach a determination as to whether a challenged government activity runs afoul of the first amendment's establishment clause. As Justice Powell noted, these types of cases present "some of the most perplexing questions to come before this Court." *Committee for Public Education and Religious Liberty v. Nyquist*, 413 U.S. 756, 760 (1973). However, while the problems presented may be difficult, the method of their resolution has become routine:

> [T]he now well defined three-part test that has emerged from our decisions is a product of considerations derived from the full sweep of the Establishment Clause cases. Taken together these decisions dictate that to pass muster under the Establishment Clause the law in question, first, must reflect a clearly secular legislative purpose, e.g., *Epperson v. Arkansas*, 393 U.S. 97 [89 S.Ct. 266, 21 L.Ed.2d 228]

> (1968), second must have a primary effect that neither advances nor inhibits religion, e.g., *McGowan v. Maryland*, 366 U.S. 420 [81 S.Ct. 1101, 6 L.Ed.2d 393] (1961); *School District of Abington Township v. Schempp*, 374 U.S. 203 [83 S.Ct. 1560, 10 L.Ed.2d 844] (1963), and, third, must avoid excessive government entanglement with religion, e.g., *Walz v. Tax Comm'n*, 397 U.S. 604 [90 S.Ct. 1409, 25 L.Ed. 2d 697] (1970). See *Lemon v. Kurtzman*, 403 U.S. 602, 612-614 [91 S.Ct. 2105, 29 L.Ed.2d 745] (1971); *Tilton v. Richardson*, 403 U.S. 672, 678 [91 S.Ct. 2091, 29 L.Ed.2d 790] (1971). (footnote omitted.)

Nyquist, 413 U.S. at 772-73.

The current establishment clause test outlined above was articulated for the first time in *Lemon v. Kurtzman*, 403 U.S. 603 (1971). In the succeeding twelve years this Court has consistently employed the tripartite "*Lemon* test" either to strike down or to uphold governmental action challenged under the establishment clause. *See, Stone v. Graham*, 449 U.S. 39 (1980); *Committee for Public Education & Religious Liberty v. Regan*, 444 U.S. 646 (1980); *Roemer v. Board of Public Works*, 426 U.S. 736 (1976); *Meek v. Pittenger*, 421 U.S. 349 (1975); *Hunt v. McNair*, 413 U.S. 734 (1973); and *Nyquist*, 413 U.S. 756 (1973).

Clearly, the *Lemon* test is the only proper test to employ in order to determine whether a challenged state action violates the establishment clause. This Court has repeatedly made this point and, accordingly, lower state and federal courts have relied exclusively on the *Lemon* criteria when called upon to interpret the establishment clause. *See, e.g., Allen v. Morton*, 495 F.2d 65, 68 (D.C. Cir. 1975) ("The propriety of that three part test is well established. . . ."); *Fox v. City of Los Angeles*, 139 Cal. Rptr. 180, 182 (1977) ("Emerging from the line of establishment clause cases that have come before the Supreme Court is a tripartite test 'that has been clearly

stated, if not easily applied.' ") (*citing Meek v. Pittenger*, 421 U.S. 349, 358 (1975)); as well as a plethora of other establishment clause cases.

The district court below correctly applied the *Lemon* criteria, which it described as "the familiar three-prong test", to the facts of this case. *Donnelly v. Lynch*, 525 F. Supp. 1150, 1162 (D.R.I. 1981). On appeal, the United States Court of Appeals for the First Circuit reviewed the district court's decision under what it also regarded as "the familar tripartite test announced in *Lemon v. Kurtzman*". *Donnelly v. Lynch*, 691 F.2d 1029, 1033 (1st Cir. 1982). However, instead of relying solely upon the *Lemon v. Kurtzman* test, the appellate court felt that this Court's recently announced decision in *Larson v. Valente*, 102 S.Ct. 1673 (1982) (rendered subsequent to both the decision by the district court and oral argument before the court of appeals) made it "clear" that the *Lemon* test was no longer entirely appropriate. *Donnelly*, 691 F.2d at 1334. In its place, the First Circuit substituted a "strict scrutiny" test of the kind normally employed in equal protection cases, and held the City of Pawtucket's action to be unconstitutional because it was not justified by a "compelling governmental interest." *Donnelly*, 691 F.2d at 1334-35.

The First Circuit's reliance on *Larson v. Valente* is however, fundamentally misplaced. *Larson* involved a challenge to a Minnesota state statute which denied an exemption from certain registration and reporting requirements to religious organizations receiving more than half of their total contributions from nonmembers. The statute's "express design" was to burden select disfavored religious denominations, such as the Unification Church, while leaving older well-established religious organizations exempt from its reach. *Larson*, 102 S.Ct. at 1685, 1688. The legislative history surrounding the subject registration and reporting requirements in *Larson* demonstrated that the fifty percent rule "was passed in com-

mittee for the sole purpose of exempting the [Roman Catholic] archdiocese from the provision of the Act." 102 S.Ct. at 1688. Further, there was additional evidence that the rule was intended to deal with "certain religious organizations which are soliciting by direct mail and, according to one state senator, have 'people running around airports'." *Id.*

This Court was obviously correct in applying strict scrutiny analysis to the facts presented in *Larson*. It constitutes a plain violation of the principle of denominational neutrality contained in the establishment clause for a legislature to purposively enact a statute which selectively burdens disfavored religious groups. Laws "that discriminate *among* religions" in this fashion clearly warrant the application of strict scrutiny analysis. 102 S.Ct. at 1687. The situation is analogous to the strict scrutiny analysis afforded statutes that discriminate *among* the races in equal protection cases.

In the instant case, however, we are not presented with an invidious discrimination *among* religious denominations. Indeed, there are properly speaking *no* religious denominations involved in this case at all. Unlike the Minnesota Legislature in *Larson*, the City of Pawtucket is not "effect[ing] . . . favoritism among the sects" that would work to the deterrence of a specific religious belief. *Id.* at 1684 (*citing Abington School District v. Schempp*, 374 U.S. at 305.) The City has displayed a nativity scene. To that extent, it has accommodated a religious, though nondenominational group. However, the benign accommodation of religious groups has never been found unconstitutional by this Court. *Zorach v. Clausen*, 343 U.S. 306 (1952).

Put another way, what the City has done by erecting a Christmas display with a nativity scene in a privately owned park at Christmas time is merely to recognize that the Christmas holiday has an important *Christian* religious heritage. Accordingly, it has assisted in the display

of a creche to manifest this religious heritage aspect of the Christmas celebration. No specific *religious* denomination is either favored or disfavored by the display of the creche. Consequently strict scrutiny analysis is completely unwarranted. As the Eleventh Circuit recently recognized:

> Where the challenged action involves alleged discriminatory treatment of various religions by a government, the court has applied a "strict scrutiny/compelling governmental interest" standard similar to that which prevails under equal protection analysis . . . . no evidence has been presented concerning the state's refusal to approve construction of symbolic expressions of religions other than Christianity in state parklands. In the absence of any evidence of an "express design [to] burden or favor selected religious denominations" we conclude that the *Lemon* test remains the controlling legal standard .

American Civil Liberties Union of Georgia v. Robun County Chamber of Commerce, 678 F.2d 1379, 1390 n.20 (11th Cir. 1982). Nevertheless, the First Circuit has misread *Larson* as standing for the proposition that an act which discriminates between Christian and non-Christian religions must be evaluated under the test of strict scrutiny.

It is difficult to understand how acknowledging the Christian religious component of the Christmas holiday constitutes an act of "discrimination." What precisely are the non-Christian religions that are being "discriminated" against? Hinduism? Confucianism? But it is clear that December 25th has no religious significance for these religions and also that they have no connection whatsoever with this holiday which has obvious associations with the Christian religion.

The First Circuit fails to demonstrate any discriminatory impact on these "non-Christian religions" which might justify holding the City's actions unconstitutional.

Moreover, it even fails to first establish an *intent* on the part of the City of Pawtucket to purposefully discriminate against non-Christian religions which is the unavoidable prerequisite to any application of strict scrutiny analysis. *See Jefferson v. Hackney*, 406 U.S. 535 (1972) ("The acceptance of appellant's constitutional theory would render suspect each difference in treatment . . . , however lacking in racial motivation . . . and we do not find it required by the fourteenth amendment.") Impermissible discriminatory intent may not be inferred from a finding that the creche is a Christian religious symbol. To allow Respondent to make such an inference allows it to presuppose what it must prove, namely that the inclusion of the creche was an intentional endorsement on the part of the City of the Christian religion. Respondent must affirmatively prove that the City intended a discriminatory religious purpose. Evidence in the record concerning the stated purpose of the display (i.e., to promote goodwill and bolster commercial activity in the City), and the actions of City officers over the past forty years taken as a reflection of City adherence to this stated purpose, clearly do not support a finding of discriminatory or preferential intent.

As the City explained and the Court of Appeals for the District of Columbia Circuit recognized in *Allen v. Morton*, 495 F.2d 65, 69 (D.C. Cir. 1978), even if one accepts the proposition that the creche is a Christian religious symbol, it is also a recognized element of the commemoration of the Nation's celebration of Christmas as a national holiday in its depiction of one of the most traditional aspects of our national history associated with Christmas. Because the nativity scene has acquired substantial secular significance in the celebration of this national holiday, allegations of discrimination or preference in favor of Christianity are unsupportable. The creche is simply one of this nation's traditional Christmas symbols, and, as this Court has stated in *McCollum v. Board of*

Education, 333 U.S. 203, 256 (1982): ". . . Devotion to the great principle of religious liberty should not lead us into a rigid interpretation of the constitutional guarantee [of denominational neutrality] that conflicts with the accepted habits of our people."

In short, it is simply a historical fact that the Christmas holiday has Christian overtones associated with it. It can hardly be said to constitute "discrimination" against non-Christian religions to recognize this fact. If it did, then it would logically follow, as the dissent below noted, that Christmas as a national holiday itself is unconstitutional since such state recognition of the birth of Christ would clearly favor the Christian religion over all others and thereby impermissibly "burden" those other non-Christian religions. *See, Donnelly v. Lynch*, 691 F.2d at 1038 (Campbell, J. dissenting). Such a result would clearly be absurd.

The First Circuit's use of strict scrutiny analysis should be rejected for one final reason. If its use in establishment cases of this nature were sanctioned by this Court, widespread confusion would be engendered in all lower federal and state courts. After years of striving to articulate a clear, consistently-applied test for passing on the constitutionality of government interaction with religion, this Court should not sanction a decision which will cast the validity of that method in doubt and leave lower court judges vacillating in uncertainty between the two tests.

II. THE CITY'S ACTIONS SATISFY THE THREE-PART *LEMON* TEST AND ARE CONSTITUTIONAL UNDER THE ESTABLISHMENT CLAUSE OF THE FIRST AMENDMENT

As demonstrated in Part I, *supra*, the First Circuit erred in applying the strict scrutiny analysis of *Larson v. Valente* to the case at bar. The district court correctly applied the traditional three-part test first enunci-

ated by this court in *Lemon v. Kurtzman* in order to determine whether the establishment clause had been violated but reached an incorrect result.

A. The City Of Pawtucket's Purpose For Including The Creche In Its Traditional Christmas Display Was Clearly Secular

Under the first prong of the establishment clause test set down by this Court in *Lemon v. Kurtzman*, 403 U.S. 602 (1971), the government action under scrutiny must be found to have a secular purpose. This "purpose test" has generally received loose application, and in most cases any showing of probable secular purpose has been accepted as sufficient. *See* L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 14-8 (1978). Thus, the district court should have accorded a great deal of weight to the City of Pawtucket's ostensible and articulated purposes in including the creche in its Christmas display especially in the absence of evidence showing these motivations to be self-serving or merely post-hoc rationalizations.

The City advanced three entirely secular motivations for its actions: the comprehensive exposition of the cultural history of the American celebration of Christmas; the attraction of holiday shoppers to the City's commercial district within the auspices of revitalization efforts; and the spreading of the holiday messages of peace and good will. *See Donnelly v. Lynch*, 525 F. Supp. at 1162.

In view of the fact that the City of Pawtucket had erected and maintained similar traditional displays and decorations throughout the City during the Christmas season for over forty years the alleged motivations could hardly be said to be post-hoc or self-serving. Nevertheless the district court ignored these arguments and found that because the creche is a "patently religious symbol," its use demonstrated a *per se* impermissible purpose. *Donnelly v. Lynch*, 525 F. Supp. at 1172. The United States Court of Appeals for the First Circuit inexplicably agreed

with the district court's "finding" that the City was "unable to advance *any* legitimate secular purpose for inclusion of the creche in the outdoor display" despite the fact, as noted above, that the City advanced three legitimate secular purposes for its actions. *Donnelly v. Lynch*, 691 F.2d 1029, 1035 (1982) (emphasis added).

The district court's finding of an impermissible purpose solely on the basis of the religious nature of the symbol is clearly erroneous. *Amicus* does not dispute the fact that the creche is an inherently religious symbol. "However, merely because the creche is a religious symbol, courts may not, as the *Donnelly* court did, infer an impermissible purpose. Legislative purpose must be established irrespective of the nature of the instrument." Comment, PUBLICLY-FUNDED DISPLAY OF RELIGIOUS SYMBOLS: THE NATIVITY SCENE CONTROVERSY, 51 Cin. L. Rev. 353, 369 (1982) (footnotes omitted). As the Supreme Court of Oregon noted when passing upon the constitutionality of the erection of a large cross in a municipal park: "it has been uniformly held that in determining the validity of either a cross or a nativity scene on public property, the controlling question is not whether such a cross or nativity scene is a religious symbol, but whether the purpose of its display is religious or secular." *Eugene Sand & Gravel, Inc. v. City of Eugene*, 558 P.2d 338, 346 (1976). Therefore, although the presence of a patently religious symbol, such as the creche, in conjunction with state-sponsored activities automatically triggers the application of the *Lemon* test it may not be used to raise a presumption of an impermissible purpose.

The City's primary motivation for the inclusion the creche, i.e., its traditional association with the holiday, cannot be challenged even though the nativity scene also has religious connotations. Recognition of the religious nature of a nativity scene is merely recognition of the fact that the influence of religious symbolism is inescapable during the Christmas season. The secular and reli-

gious aspects of Christmas have been intertwined throughout history and it would be impossible to attempt to separate the two. *See Citizens Concerned For Separation of Church & State v. City and County of Denver*, 526 F. Supp. 1310, 1313 (D. Colo. 1981). Surely then government action that has as its purpose the accommodation of the religious nature of the American people and the Christmas holiday itself is not for that reason alone impermissible. *Fox v. City of Los Angeles*, 139 Cal. Rptr. 180, 183 (1977). *See also, Abington School District v. Schempp*, 374 U.S. 203, 306 where Justice Goldberg in his concurring opinion states:

> Neither the state nor this Court can *or should* ignore the significance of the fact that a vast portion of our people believe in and worship God and that many of our legal, political and personal values derive historically from religious teachings. Government must inevitably take cognizance of the existence of religion and, indeed under certain circumstances the First Amendment may require that it do so (emphasis added).

In this instance, the nativity scene was used to passively acknowledge the religious heritage of the holiday and no evidence exists to demonstrate a purposeful intent on the part of the City either to promote the participation by anyone in the affairs of any religious organizations or sect, or to confer an imprimatur of government approval on Christianity. *Cf., Paul v. Dade County*, 202 F.2d 833, 835 (1967) (string of lights forming a Latin cross on courthouse found secular in purpose as part of County's Christmas street decorations).

It is appropriate to ascertain government purpose by looking at the entire context of its presentation or the use of a religious symbol. In the instant case, the incorporation of the creche within the scheme of the City's Christmas display is strong indicia of secular purpose

since it is only part of a larger secular display which also includes 2500 Christmas lights, Christmas trees, figurines, snowmen, Disney characters, a live Santa Claus and a wishing well. Further, there is no evidence that the City had at any time denied requests for inclusion of the symbols of other religions in this or any other display or approved of religious ceremonies in front of the creche. *See, Fox v. City of Los Angeles*, 139 Cal. Rptr. at 185. Additionally, the tradition of including the creche in the City's display is a time honored one, extending over four decades. As the court noted in *McCollum v. Board*, 333 U.S. 203, 256 (1948), "devotion to the great principle of religious liberty should not lead us into a rigid interpretation of the Constitutional guarantee that conflicts with the *accepted habits of our people*," (emphasis added). Indeed the purpose here of providing a colorful and complete depiction of the nation's Christmas celebration is no more objectionable than "that of a postage stamp bearing a reproduction of a religious painting or a Government sponsored museum display illustrating various religious or holiday customs." *Allen v. Morton*, 495 F.2d 65, 69, n.3 (D.D.C. 1973). Thus the City's actions clearly satisfy the first prong of the *Lemon* tests.

B. Including A Creche In The City's Predominantly Secular Christmas Display Does Not Have The Direct And Immediate Effect Of Advancing Or Inhibiting Religion

In order to satisfy the second prong of the *Lemon* test, the government action must have a primary effect that neither advances nor inhibits religion. *Lemon v. Kurtzman*, 403 U.S. 603, 612-613 (1971). It is important to note at the outset that this Court has upheld government action challenged under the establishment clause, even though a religious organization derives some incidental benefit, where the *primary effect* has not served to ad-

vance religion. *See, e.g., Roemer v. Board of Public Works*, 426 U.S. 736 (1976) (allowing state aid to colleges and universities for nonsectarian expenditures regardless of religious affiliation). Such a conclusion is mandated by the recognized establishment clause requirement of benevolent neutrality; to hold otherwise would be to sanction hostility to religion, and to encourage an impermissible preference for non-believers over believers.

As Justice Douglas noted:

> The First Amendment . . . does not say that in every and all respects there shall be a separation of Church and State. Rather, it studiously defines that manner, the specific ways, in which there shall be no concert or union or dependency one on the other. That is the common sense of the matter. Otherwise the state and religion would be aliens to each other—hostile, suspicious, and even unfriendly.

Zorach v. Clausen, 343 U.S. at 312.

This Court has articulated two guidelines for application of the "effect" test of *Lemon* in *Hunt v. McNair*, 413 U.S. 734, 743 (1973):

> Aid normally may be thought to have a primary effect of advancing religion [1] when it flows to an institution in which religion is so pervasive that a substantial portion of its functions are subsumed in the religious mission or [2] when it funds a specifically religious activity in an otherwise substantially secular setting.

Clearly the display of a creche as part of a dominantly secular municipal Christmas celebration by the City of Pawtucket falls outside of these twin guidelines. First of all there is no particular religious "institution" *per se* which is being "advanced" by the display. As already noted above, the City has merely accommodated a reli-

gious, although nondenominational, symbol. Second, unlike the situation in *Gilfillan v. City of Philadelphia*, 637 F.2d 924 (3rd Cir. 1980) where the City of Philadelphia's expenditure of $200,000 to construct a special platform *used to celebrate a Mass* by the Pope was held to violate the establishment clause, no "religious activity" occurred. To reiterate, it must be

> . . . borne in mind that this creche was *but part of* a larger display in the same location which included a talking wishing well, a Santa's house inhabited by a live Santa who distributed candy, trees of various sizes, reindeer, and 21 cutout figures including a clown, dancing elephant, robot and teddy bear. The whole melange, including the creche, was nothing more nor less than a potpourri of well-recognized Christmas symbols. Had a solitary creche been displayed in July, one might see it as designed to serve chiefly religious ends, since there would then be no holiday with which it was particularly identified. But creches and Santas in December are as typically symbolic of Christmas as turkeys and Pilgrims in November are symbolic of Thanksgiving.

Donnelly v. Lynch, 691 F.2d at 1037 (Campbell, J. dissenting.)

Focusing, therefore, not on the creche itself but on the secular context of the entire display, it is clear that any benefit conferred to the Christian religion as a whole is insubstantial. The presence of numerous other secular figures, Santa Claus, reindeer, the wishing well, wooden representations of stars and trees, snowmen, Disney characters, Christmas trees and Christmas lights all serve to diminish the religious impact of the creche. None of the activities which take place in the display area during the holiday season are religious in character or in any way specifically connected with the creche. Thus, no threat of government indoctrination, such as in the public school

setting, or religious interference, such as in *Larson* through application of uneven reporting/registration requirements, accompanies the "temporary, static gesture of acknowledgement here challenged." *Fox*, 139 Cal. Rptr. at 184. The display occurs only once a year and is confined to the historic museum grounds of a private park.

Additionally, the rationale of the majority in *Fox* is particularly persuasive here.

> The conclusion is inescapable that if the challenged custom really conferred a measurable benefit upon religion, members of various sects and faiths would either have expressed a desire for equal recognition and aid, or in the alternative, lodged their objection to the practice of prejudicial sovereign endorsement.

139 Cal. Rptr. 180, 184 (1977). Although the mere longevity of the City's traditional display cannot isolate it from constitutional scrutiny, the forty year backdrop of near total absence of discontent by either the general public or by particular religious denominations indicates further that whatever benefits are conferred upon religion in this case are remote and inconsequential. Thus, the city of Pawtucket's inclusion of a creche in its Christmas display satisfies the second prong of the *Lemon* test.

C. The City of Pawtucket's Christmas Display Does Not Involve It In Excessive Entanglement With Religion Nor Result In Political Divisiveness

The third prong of the *Lemon* test focuses on the degree and quality of government interaction with religion that the challenged activity promotes. *Lemon v. Kurtzman*, 403 U.S. at 615. The first part of this test, "administrative entanglement," applies where the activity brings government officials into close, ongoing contact with the affairs of religious institutions, "thereby endangering the independence and integrity of both Church and State." *Id.* at 615-20. As the district court below stated:

> Unquestionably administrative entanglement has not occurred in this case. The evidence shows that Pawtucket purchased the components and designed the layout of the Hodgson Park display without interaction with any of the community's churches or religious organizations.

Donnelly v. Lynch, 325 F. Supp. 1150, 1179 (1981). As the display is planned entirely by City officials, this case is thus clearly distinguishable from *Allen v. Morton* where government officials sat on a governing board responsible for the display with professional clerics. *Citizens Concerned*, 526 F. Supp. at 1315.

However, the district court below did find that the City's activities violated the second part of the entanglements test, "political divisiveness." It must be noted, however, that the Supreme Court has never held that the potential for political divisiveness is alone sufficient to invalidate a government's action under the establishment clause. It is merely "a warning device," triggering a full *Lemon* analysis. *Committee for Public Education v. Nyquist*, 413 U.S. at 798. *See also* Gaffey, POLITICAL DIVISIVENESS ALONG RELIGIOUS LINES: THE ENTANGLEMENT OF THE COURT IN SLOPPY HISTORY AND BAD PUBLIC POLICY, 24 St. Louis U. L.J. 205 (1980). Further, the Court of Appeals, although finding it unnecessary to rely on the political divisiveness analysis, summarily disposed of the district court's reliance on this factor:

> . . . we are unwilling to place much weight on the court's determination that the City's actions risked political divisiveness along religious lines. As the court noted, this factor alone has never been held sufficient to invalidate governmental action, and First Amendment scholars have questioned and criticized the political divisiveness strand of the entanglement test on historical and prudential grounds.

Donnelly v. Lynch, 691 F.2d 1029, 1035 (1st Cir. 1982) (citations omitted). This result is consistent with other

cases. For example, in *Fox*, 139 Cal. Rptr. at 185, the court stated: "considering the negligible impact of the practice [of stringing lights on a courthouse in the shape of a Latin cross] and its uneventful history, no real danger of divisive political potential is herein presented." Similarly the district court in *Citizens Concerned*, 508 F. Supp. at 827, found:

> As to alleged political divisiveness, the court observes that in light of the secular purpose of the total display and a non-religious primary effect, no religious group or groups are being benefitted and divisiveness on religious lines is not likely to be intensified.

The district court relies heavily on the outcry provoked by the ACLU's challenge to this traditional Christmas display as conclusive "proof" that the City's sponsorship of the display has produced a division in the community along religious lines. *Donnelly v. Lynch*, 525 F. Supp. at 1182-84. The fact is, however, that it is the ACLU that has fostered this division *not* the City. For well over forty years the City displayed a creche in the community all without any apparent dissension. It has only been when the ACLU has attempted to foster a hostility to the religious element of the traditional Christmas celebration that a division has occurred. For this Court to sanction the lower court's decision on this point would be to encourage those elements of society which seek to foster divisions in the community along religious lines.

In light of the absence of concrete evidence to the contrary, the potential for political divisiveness resulting from the City of Pawtucket's inclusion of the creche in its dominantly secular Christmas display is below the level worthy of judicial notice. As the City's actions satisfy all other parts of *Lemon*, this Court is without precedent to find a violation of the establishment clause based solely on this last insufficient consideration.

CONCLUSION

The Washington Legal Foundation believes that the federal court below incorrectly held that the City of Pawtucket's sponsorship of a traditional Christmas creche at Christmas time violated the establishment clause. To allow this ruling to stand would be tantamount to requiring the complete elimination of all religious symbolism from publicly sponsored Christmas celebrations and would be to manifest an impermissible hostility toward religion. For all these reasons the lower court should be reversed.

Respectfully submitted,

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